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The Supreme Court of the United States

October Term, 1943

No. 267

UNITED STATES OF AMERICA,
Petitioner

v.

SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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STATEMENT

Respondent is a national banking association incorporated under Section 34a of the National Bank Act (U. S. C. A., Title XII, § 34a) by the consolidation of a state and national bank (R. 16, 77, 93). Since the act prescribes the continuity of corporate existence and identity of the participants and specifically dispenses with the necessity for conveyances or instruments of transfer, no deed, assignment or other instrument was in fact executed to transfer the real estate, stocks, bonds or other property whether owned outright or held in some fiduciary capacity. The certificates of stock were not endorsed and there was no delivery or change of possession (R. 77, 94).

Notwithstanding the peculiar pains taken by Congress to prescribe and define the legal effect of such a consolidation, the collector of internal revenue insisted

that it was nothing but a merger of the state bank into the national bank similar in all respects to a merger under the statutes of New York or Massachusetts (R. 19-23). Upon this assumption he determined that the respondent had acquired its banking quarters, bonds constituting its capital assets and stock and bonds held in different trust accounts by conveyances and transfers liable to documentary stamp taxes under Title VIII of the Revenue Act of 1926.

The same theory was urged upon the District Court and the Circuit Court of Appeals. It is now presented by the petition for certiorari as the basis for the claimed conflict in decision between the Circuits.

ARGUMENT

The reason given for granting the writ is that the decision below is in conflict with City Bank Farmers Trust Company v. Hoey, 125 Fed. (2) 577 (C. C. A. 2), and State Street Trust Company v. Hassett, 134 Fed. (2) 156 (C. C. A. 1). But whatever the diversity of language no conflict in fact exists except upon the theory that a consolidation under the National Bank Act is identical with a merger under the New York and Massachusetts statutes.

City Bank Farmers Trust Company v. Hoey, 125 Fed. (2) 577, determined that assets held in trust by Bank of America Trust Company were transferred to City Bank Farmers Trust Company upon the merger of the former into the latter under authority of the New York statutes, Article 35 (q), exempting transfers by operation of law (Article 35 (r) 1932) and Article

35 (h), exempting transfers from a deceased or resigned trustee to his successor (Article 35 (h) 1932), were held inapplicable.

State Street Trust Company v. Hassett, 134 Fed. (2) 156, decided that the same regulations in their 1932 form (Articles 35 (h) and 35 (r) did not exempt transfers of securities held in trust by Union Trust Company of Boston to State Street Trust Company upon the merger of the former into the latter under authority of the Massachusetts statutes.

Both these cases and Weil v. United States, 155 Fed. (2) 999, refused to accept the statutes and decisions of New York and Massachusetts as conclusive that such transfers were by operation of law.

Of course, these cases decide merely that securities transferred by a trustee to its successor are not exempted from tax by two particular articles of the regulations. Consequently they cannot be said to conflict with the present decision in so far as it deals with owned assets and especially real estate, *even if it be assumed that the mergers involved in those cases are identical with a consolidation.

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* Real Estate. The language of Schedule A-8 imposing a documentary stamp tax upon conveyances is startlingly different from the language of Schedules A-3 and A-9 imposing the tax upon transfers of stocks and bonds. Abbreviated slightly, it is:

"8. Conveyances: Deed, instrument, or writing, delivered . . ., whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers . . ."

The tax is not upon the sale, not upon the transfer, but upon the instrument of conveyance. Also the deed must be an instrument of conveyance effective under general law to vest title in and of itself. The regulations so interpret the language of the statute. Thus an option to purchase real estate or a contract to sell real estate is not taxable unless they vest title. (Articles 91 and 106)

We will discuss the difference between mergers under state statutes and a consolidation under the National Bank Act at this point and return to the other point further along.

A national banking association is not an ordinary bank. It is the peculiar creature of the National Bank Act created to be an agency of the national government and regulated and controlled by Congress for national purposes. Congress has power to impose such burdens and duties and to accord such privileges and immunities as are appropriate to accomplish its purpose. Particularly, Congress has plenary power to prescribe the conditions, formalities, incidents and legal effect of their formation.

These self-evident propositions are mentioned merely to point the difference between the formation of a state bank and a national bank. Congress has power to dispense with the taxable incidents of a given transaction whether a state legislature has or not. The conclusion that the law of Massachusetts or New York could not exempt from federal taxation transfers incident to a merger does not conflict with the conclusion reached in this case.

Examination of the National Bank Act discloses that national banks may be formed out of existing institutions in three ways set forth in §§ 35, 33 and 34a of Title XII, U. S. C. A. Section 35, Act of June 3, 1864, as amended, authorizes the conversion of a state bank into a national banking association. Section 33, Act of

November 17, 1918, as amended, authorizes the consolidation of two or more national banking associations into one association, and Section 34a, Act of February 25, 1927, as amended, authorizes the consolidation of a state bank and a national banking association. In each case the essential requirements are: The affirmative vote of shareholders, the execution of articles of association or an agreement by the directors and approval by the Comptroller of the Currency.

In Metropolitan National Bank v. Claggett, 141 U. S. 520, it was stated that a conversion of a state bank into a national banking association results in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction. It remains one and the same bank and goes on doing business uninterruptedly. To the same effect see

Michigan Insurance Bank v. Eldred, 143 U. S. 293;

Burke v. United States, 58 Fed. (2) 739;

People's National Bank v. Board of Commissioners, 103 Pac. (Okla.) 682.

Formation of a single association by the consolidation of existing associations or state banks under §§ 33 or 34a are attended with the same results as the formation of an association by conversion; that is to say, there is a continuation of the same body, with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction. The banks remain the same and go on doing business

uninterruptedly. The applicable portion of §34a is quoted in the margin.*

In brief, national banking associations are formed out of existing institutions whether one or many, state or national, by a procedure substantially identical and with identical effect, namely, the corporate existence is not destroyed but continues, the banking business goes on without interruption, the property, assets and business are not transferred but retained.

If respondent is "deemed to be the same corporation" and "holds and enjoys the same rights of property in the same manner and to the same extent" as the Spokane and Eastern Trust Company "by virtue of the consolidation" alone "without any deed or other transfer" and without other action on any one's part, then there has been no transfer of titles. The Spokane and Eastern Trust Company under another name and

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* ". . . Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions.

"All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation . . ."

under another jurisdiction is continuing the same banking business in the same place with the same assets, the same rights of property and subject to the same liabilities. It has not sold or transferred its assets—it has changed its name and subjected itself to the supervision of the federal government. There has no more been a transfer of assets than there would have been if the Spokane and Eastern Trust Company had converted into a national banking association.

With this simple system devised by Congress to encourage the conversion and the consolidation of state banks into national banking associations contrast a merger under state statutes such as that in State Street Trust Company v. Hassett, 134 Fed. (2) 156. We quote from page 157:

> "In July, 1936, the Union Trust Company of Boston, hereafter called 'Union,' was merged into the taxpayer, State Street Trust Company, hereafter called 'State,' both Massachusetts corporations, in accordance with the terms of a written agreement previously entered into by the two companies. By a bill of sale and acknowledgment of liability, Union sold, assigned, transferred and delivered to State all of its assets and property . . ."

It is scarcely possible to find a conflict between decisions on two such dissimilar situations. Likewise it is difficult to point to anything which can be called a sale or transfer of any asset of one bank to another in a consolidation under the National Bank Act. There is a complete absence of that "relinquishment of ownership" by one "for the benefit of another" and "the resultant acquisition of it by him" which in the language of this court in Raybestos-Manhattan Co. v. United

States, 296 U. S. 60, 63, "calls the statute into operation."

In the present case the documentary stamp tax was collected under authority of Schedules A-3, A-8 and A-9, Sec. 800 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended and in force on December 28, 1935. The petition for certiorari omits the articles of Regulations 71 (1932 edition) discussed in this and the two cases with which conflict is claimed. They are Article 35 (h), interpreting the act as exempting transfers of securities from the name of a deceased or resigned trustee to his successor, and Article 35 (r), likewise interpreting the act as exempting transfers by operation of law. These two articles are printed in the margin.*

As we pointed out above, the cases in the First and Second Circuits discussing transfers of trust assets pursuant to mergers under the New York and Massachusetts statutes do not consider transfers of owned assets. In the present case the court was called upon to consider a tax upon the claimed transfer of owned assets, both real estate and personal property (banking quarters and bonds in capital account), in addition to trust assets. Necessarily the only possible conflict can be in respect to one of these three, namely, the

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* "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to the tax:

"(h). The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

"(r). Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfers of stock from decedent to executor."

trust assets. Even this possible conflict has been removed by § 506 of the Revenue Act of 1942, c. 619, 56 Stat. 957, providing that transfers by operation of law shall not be exempt unless otherwise exempted but specifically exempting transfers from trustees to surviving, substituted, succeeding or additional trustees of the same trust. It scarcely needs remark that under the Revenue Act of 1942 the trust assets claimed to have been transferred in the present case and in the cases of the First and Second Circuits would be exempt from tax.

CONCLUSION

It is accordingly respectfully submitted that the decisions of the courts below in the present case are manifestly correct for the reason that a consolidation under the National Bank Act cannot because of its nature involve a sale or transfer upon which documentary stamp taxes are imposed by Title VIII of the Revenue Act of 1926. Secondly that the decisions in the Second and First Circuits are upon totally different facts and therefore no conflict exists requiring a review of the decision in this case upon writ of certiorari.

Respectfully submitted,

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